In the Supreme Court of the United States

October Term, 1979

No. 79-1241

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

ASHLAND OIL, INC.,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ashland Oil, Inc. prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on October 15, 1979.

OPINIONS BELOW

The opinion of the court of appeals (A. 1a) is reported in 607 F.2d 335, and that of the District Court for the Northern District of Oklahoma (A. 62a) is reported in 463 F.Supp. 619. These opinions followed proceedings on remand from the rehearing *en banc* opinion of the court of appeals

(A. 8a) reported in 554 F.2d 381, cert. denied, 434 U.S. 921, 968, which had affirmed in part, and remanded limited issues, on review of the district court's first opinion (A. 99a) reported in 364 F.Supp. 6. These opinions, together with an unreported court of appeals opinion (A. 43a) superseded by the *en banc* opinion on rehearing, are separately appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit (A. 4a) was entered on October 15, 1979. Ashland's timely petition for rehearing was denied on November 14, 1979 (A. 6a). Jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

QUESTIONS PRESENTED

1. The doctrine of law of the case embodies an important legal policy, akin to *stare decisis*, which prevents unfairness to parties and assists in controlling the length and expense of litigation by preventing the relitigation, in the same case, of issues already decided on appeal. Over a century ago, this Court held the law-of-the-case doctrine controlling in federal court litigation, but ambiguities have since developed.

This petition for certiorari presents the following questions:

(a) Does the federal doctrine of the law of the case preclude relitigation of the principal valuation factor for helium taken by the United States as part of a massive federal helium conservation program during 1963-1972, when that valuation factor had been rejected by the court of appeals on a rehearing *en banc* in an earlier appeal, following which no intervening change in law or fact had occurred?

(b) Is the party which prevailed on an issue on appeal, as to which a petition for certiorari was denied, thereafter entitled to rely upon that decision in the future conduct of the litigation?

2. Should post-judgment interest under 28 U.S.C. §1961 commence to accrue from the time of entry of the original judgment for plaintiff, notwithstanding the amount to which plaintiff is entitled is ordered to be recalculated according to objective data by an appellate court, resulting in a revised amount for which judgment is later entered?

STATUTE INVOLVED

28 U.S.C. §1961, 62 Stat. 957, pertinent to Question No. 2, provides:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case, where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

STATEMENT OF THE CASE

This action, invoking jurisdiction by reason of diversity of citizenship under 28 U.S.C. §1332, was brought by Ashland against Phillips in 1967 to recover for the value of Ashland's helium contained in natural gas delivered to Phillips, the helium having been extracted by Phillips and delivered to the United States for conservation under a

long-term contract made in 1961. The action was an offshoot of massive class action cases, pending since 1963, in federal court in Kansas involving large quantities of helium similarly extracted and delivered to the United States by three other companies having long-term conservation contracts with the government. The helium was produced from thousands of gas wells located in Kansas, Oklahoma, and Texas.

In an earlier appeal (A. 8a), the court of appeals had made a specific decision disapproving a valuation theory asserted by respondents, had affirmed Ashland's right to recover, and had remanded the case on other issues. On remand, however, the district court adopted the valuation theory disapproved on appeal (A. 62a). Ashland appealed, relying on the federal doctrine of the law of the case which precludes relitigation of issues decided on a prior appeal. The court of appeals, affirming (A. 1a), also declined to apply the law of the case, and gave no consideration to the fact that Ashland, in relying on the federal doctrine in district court, had not tried its case on the theory that the valuation factor was any longer open to relitigation.

The court of appeals also declined to award Ashland interest on its judgment, under 28 U.S.C. §1961, from the time of its earlier 1973 judgment, thereby following a line of decisions which is in conflict with the contrary rule in other circuits.

The decision below evolved from the following background.

In *Northern Natural Gas Company v. Grounds, et al.*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063, the classes of gas producers and landowners owning royalty interests in the Kansas litigation, were held en-

titled to recover the value of their helium.[1] Those cases were remanded for a determination of that value.

Thereafter, the United States intervened in this action as a party. Trial was conducted in 1973 in the District Court for the Northern District of Oklahoma. The essential controversy was how to value helium commingled in natural gas prior to its extraction and delivery to the government.

The United States intervened because contingency price escalation provisions in the helium conservation contracts with Phillips (RI, Pls. Ex. 5, Vol. I), and other helium extractors, required the United States to pay an additional amount, above an $11.00 per m.c.f. average base price fixed in the contract, to the extent that Phillips was required to pay third parties (such as Ashland) above approximately $3.00 per m.c.f. (thousand cubic feet) for obtaining the helium to be extracted and conserved. The United States thus contended that Ashland's recovery should be a "nominal amount" not exceeding $3.00 per m.c.f.

Ashland's evidence in 1973 included all pertinent government and Phillips documents, demonstrating that no "market value" as such existed for its helium prior to extraction. Thus, Ashland contended that an alternative valuation method commonly used in the gas industry

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1. Helium is a rare, noncombustible gas with unique qualities making it indispensable for numerous industrial, technological and governmental purposes. Its only commercial source is from minute quantities commingled in natural gas in limited areas, over 95% being in the area involved in the *Northern* litigation. Its depletion in this decade will require extraction from presently non-commercial sources at costs up to $350 per m.c.f. (RI, Pls. Ex. 57, Vol. VI), as contrasted with market prices during the 1960's of only $20.00 per m.c.f. This situation dictated the massive conservation program as described in the *Northern* case.

Citations "RI" and "RII" will be to the printed appendices in the first and second appeals, respectively.

should be utilized to value its helium. This was the market value of extracted product, less the expense of extraction method, otherwise referred to as the "work-back" method. When a commodity, such as butane, or helium, is extracted from a gas stream in which it is commingled, the extracted product which is then competitively marketable for the first time as a commercial product, has a known market value. To accurately arrive at the value prior to the extraction, one need only deduct from the known value of the marketable product, the expenses of extraction including a fair return to the extractor.

Phillips and the United States, on the other hand, first contended that several special transactions were sufficiently comparable to prove commingled helium value in this case, and that these supported a value ranging from $1.16 to $3.00 per m.c.f. But they further contended that if the work-back valuation method were to be utilized, the Court should not use the value of helium being marketed as helium in a free market (about $20.00 per m.c.f.), as the starting point from which to subtract extraction expenses, but should rather use as the starting point the base contract price averaging $11.00 per m.c.f. as contained in the government conservation contract. This, of course, would have resulted, if accepted, in a much lower recovery than by using the current market price of helium as the starting point.

In its 1973 decision, the district court held that the transactions relied on by respondents were not comparable, and adopted the work-back method. The court then rejected the use of the base contract price as a starting point in the method because that base price did not reflect a market value but was a specially constructed contract, containing the contingency price escalation clause for additional third party payments, which enabled the United

States "to obtain a base price substantially lower than would otherwise have been possible." *Ashland Oil, Inc. v. Phillips Petroleum Company*, 364 F.Supp. 6, 9 (A. 105a). It found that the prices for helium sold on the private market ranged from $35.00 to $20.00 per m.c.f., and thus found that the starting value in the method should be $20.00 per m.c.f. (A. 104a), and awarded judgment accordingly, deducting extraction and purification expenses from that figure.[2]

On appeal, Phillips and the United States renewed their contention that the starting point in the work-back method should be the base contract price. They further contended that Ashland had not presented sufficient evidence of specific sales of marketable helium in the open market to support the $20.00 price utilized by the district court.

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2. The finding that the base contract price was not representative of "market value" was supported by all the historical documentation of the contract negotiations, in which the parties recognized that "no real market value for helium in natural gas has ever been established", and that the third party price escalation provisions in the contracts were "absolutely necessary" because otherwise "if these provisions were deleted the price of helium to the United States would be much higher or, it may not be possible to enter into a contract. . . ." (RI, Pls. Ex. 39, Vol. III).

This statement by the government negotiator was made concerning the first conservation contract with Northern Helex Company, which was the prototype for the later contracts, including the Phillips contract. All helium extractors ultimately insisted on that provision before execution of the contracts (Grounds I, Vol. V, p. 1531, LPX 182). In obtaining a low base price, the government also complied with 41 C.F.R. §§1-3.403-2 and 1-15.205-7 (1961), pertaining to contingent price escalation provisions, which *required* that the base contract price not include any amount for the contingency which may later require additional price payments.

Northern Helex consultants assisting in the contract pricing recognized at the time that the base price was at least $4.00 to $5.00 per m.c.f. below fair market value (RI, Ex. Vol. III, p. 688). Northern's base contract price was $11.24 as compared to Phillips' $10.30 per m.c.f., these averaging about $12.00 and $11.00 respectively, during 1963-1972, due to commodity index adjustment provisions.

In the January, 1975, decision by the court of appeals, respondents' contentions were rejected, and the valuation portion of the judgment was affirmed (A. 43a).

In the meantime, in late 1974 the Kansas district court in the *Grounds* class action cases, on remand after reversal on the liability issue, had rejected valuation of helium by the work-back method (393 F.Supp. 949), from which judgment the representative producers and royalty owners had appealed. To resolve the inconsistency, the court of appeals ordered a hearing on those appeals before the full court, *en banc,* to be consolidated with a rehearing *en banc* which it granted to respondents in this Ashland case.

After complete presentation to the appellate court in November, 1976, on a consolidated evidentiary record (A. 60a), in which the question whether the base contract prices should be utilized as the starting point in the valuation method was extensively argued (Tr. of arguments, pp. 10, 33-34, 44-45, 65, 82), the *en banc* decision in this case was entered in May, 1977, approving the work-back method. *Ashland Oil, Inc. v. Phillips Petroleum Company,* 554 F.2d 381 (A. 8a). The five-judge majority flatly rejected use of the base contract price as a valuation factor, but, in view of respondents' assertions that the $20.00 starting value utilized by the district court was not supported by evidence of specific sales of helium in the marketplace, remanded for further evidence on the selling price of such helium (A. 21a) (554 F.2d at 388). After complete analysis of respondents' contentions, the court held:

> ". . . The value here sought to be established is independent of the contract base amount. . . ." (A. 23a) (554 F.2d at 389).

Since an additional cost to be incurred by the government to market the impure conservation helium, delivered

by Phillips for underground storage, was a $2.00 per m.c.f. purification cost, the court ordered this cost to be applied in deducting from the market value of pure, or marketable, helium (A. 20a, 21a, 30a) (554 F.2d at 388 and 392). Thus, the court noted the result of its holding was that "The United States is liable for some of the additional amounts which Phillips will have to pay", and that "The Government nevertheless obviously has the basic responsibility and liability. . . ." (A. 24a, 25a) (554 F.2d at 390).

The single dissent from the *en banc* decision disagreed with the majority's rejection of the base contract price as a starting point, and its approval of the price of pure, marketable helium as the starting point. The dissent argued for use of the base contract price as the starting point, which would result in "a price close to $3.00" (A. 36a) (554 F.2d at 395).[3]

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3. The dissent objected to a value above $3.00 per m.c.f., in part because the government was liable to pay the price above that amount, resulting in a cost to taxpayers (A. 41a) (554 F.2d at 397-398). The dissent exaggerated the amounts involved, although, with 20,000,000 m.c.f.'s involved in the total helium litigation, about $140 million remains in controversy, since the difference between using the contract base price, and the market price, of helium in the valuation method is about $7.00 per m.c.f., taking account of the $2.00 purification cost.

The dissent failed to recognize that the government will resell the conservation helium, and will recover all costs (50 U.S.C. §167d), achieving a multibillion dollar benefit because prices will be several times as high as the previously depressed $20 market price for helium upon depletion of the current cheap sources in the 1980's (RII, Pls. Ex. 2-19, Vol. I).

The dissent also failed to consider the legislative history of the Helium Act Amendments, 74 Stat. 918, 50 U.S.C. §§167a, et seq. The Interior Department sought to eliminate the language in §167(a)(2) requiring payment for helium "to be measured by terms and prices determined to be commensurate with the fair market value . . ." (RI, Pls. Ex. 53, Vol. IV, p. 829), because the Department wanted to obtain commingled helium for its past monopolistic price in noncomparable transactions, in the neighborhood of $2.00 to $3.00 per m.c.f. (Private industries did not

(Continued on following page)

Phillips and the United States then filed petitions for certiorari with this Court, recognizing the adverse decision against them on this point, and relying, in part, upon the dissent. The petitions were separately denied. 434 U.S. 921, 968 (1977) (Nos. 77-221; 77-530).

In the ensuing proceedings after remand, Ashland presented documented evidence of selling prices for helium in the open market indisputably supporting the prior $20.00 value as being accurate and conservative. The district court, however, over Ashland's objection, then allowed respondents to present several newly retained economists who were permitted to testify to conclusions that the base contract price should be utilized as the starting point in the work-back method. Ashland's case had been prepared and presented in complete reliance on the prior rejection of the base contract price as being relevant to valuation (RII, Vol. I, pp. 208-333).

After the trial, the district court, adopting most of respondents' requested findings verbatim, found that its first judgment was "erroneous" (A. 63a), that the base contract price should be utilized as the starting point, and that this resulted in a helium value of $3.00 per m.c.f. (A. 97a), as had been advocated by the dissent from the *en banc* opinion.

Footnote continued—

produce and sell helium until the 1960's, the government having a monopoly prior to that time).

Congress refused to delete the provision [50 U.S.C. §167a (a)(2)], making clear that payment for helium value was to inure to the benefit of those having interests in the helium, back to the initial royalty owners from whose lands the helium was produced (RI, Ex. Vol. IV, p. 827).

The only suggestion made to Congress for determining a value "commensurate with a fair market value" was to consider the value of helium after extraction and sale in a competitive market, in connection with the extraction costs (Hearing Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960).

Ashland appealed that judgment, relying upon the law of the case as established in the earlier *en banc* decision.

A panel of the court of appeals handed down a *per curiam* opinion on October 15, 1979, summarily affirming the $3.00 value, and the use of the base contract price as the starting point in the valuation method, without discussion of Ashland's reliance on the law of the case doctrine, and without attempting to explain the obvious inconsistency with the 1977 *en banc* decision (A. 1a).

Ashland had also sought post-judgment interest under 28 U.S.C. §1961 on the revised amount of the judgment after remand, such interest to accrue on the revised amount from the date the original judgment had been awarded in 1973.

The district court rejected the contention, and the court of appeals affirmed (A. 3a) by citing *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir.), thus following a rule in conflict with that of several other circuits.

REASONS FOR GRANTING THE WRIT

The two questions presented involve basic, constantly recurring problems of federal judicial management directly affecting the current propensity of litigants to take appeals, contributing to delay and expense in federal litigation. They are clearly defined issues which can be decided by review of the appellate and district court opinions issued between 1973 and 1979.

One question pertains to the court of appeals' failure to apply this Court's federal doctrine of the law of the case, and the failure to consider the juridical impact of a party's reliance on an appellate decision in connection

with further proceedings on remand. This element of reliance is of crucial importance in federal jurisprudence of the law of the case, which has not been, but should be, settled by this Court.

The other question, of post-judgment interest under 28 U.S.C. §1961, presents an unresolved conflict among the circuits which has increasingly led to inconsistent results and great confusion, during a time when the view adopted below motivates defendants to continue litigation after adverse judgment in order to profit from the use of money owed to a prevailing plaintiff.

This case also assumes additional importance because it arose from massive class action cases which remain pending without decision in the court of appeals since arguments were presented in 1976, involving the rights of tens of thousands of citizens, and many millions of dollars.

I. This Court Should Decide an Important, Recurring Question—Is a Party Entitled to Rely on the Law of the Case Decided on Appeal, in Subsequent District Court Proceedings?

As generally stated, the law of the case precludes relitigation of an issue decided on appeal, either by the district court,[4] or by the appellate court in a later appeal in the same case,[5] unless an intervening change in law or

4. *Sibbald v. The United States*, 37 U.S. (12 Pet.) 488, 492 (1838); *Vendo Co. v. Lekto-Vend Corp.*, 434 U.S. 424 (1978); *Illinois ex rel. Hunt v. Illinois C.R. Co.*, 184 U.S. 77, 93 (1902).

5. *Insurance Group Com. v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947). The doctrine is stronger that that of *stare decisis*, 1B *Moore's Federal Practice*, §0.404(1), p. 403, because a party's "burden should not be increased by a load he has already successfully shouldered." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), cert. dism. 419 U.S. 987.

fact has occurred since the prior appeal.[6] Recently, some lower court decisions have broadly expanded those limited exceptions if the prior decision is considered "clearly erroneous and would work a manifest injustice",[7] without providing any guideline limiting an otherwise unfettered discretion.[8]

One such indispensable guideline, we submit, should be the juridical element of reliance by a prevailing party on a piror decision in the same case, an element ignored by the court below.

Specifically, the issue arises because of this Court's rule that a district court has no authority to deviate from

6. *Messinger v. Anderson*, 225 U.S. 436, 443-444 (1912); *Commissioner of Internal Revenue v. Netcher*, 143 F.2d 484, 486 (7th Cir.), cert. denied, 323 U.S. 759; *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (2nd Cir.). Commenting on the latter case as being a tendency to subordinate precedent to "justice", Cardozo observed:

> "How to reconcile that tendency . . . with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day." Cardozo, "Nature of the Judicial Process", from *Selected Writings of Cardozo*, p. 175 (Matthew Bender, 1947).

7. E.g., *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.); *Ottey v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir.); 40 *West's Federal Practice Digest 2nd*, Federal Courts §950.

8. The difference between shaping the law to meet current conditions is much different than "destruction of all rules and the substitution in every instance of the individual sense of justice, the *arbitrium boni viri*." "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law." Cardozo, "Nature of the Judicial Process", from *Selected Writings of Cardozo*, pp. 162-163 (Matthew Bender, 1947).

Even Blackstone observed that to allow a judge to vary from the law of a case according to his "private sentiments" would "make every judge a legislator, and introduce most infinite confusion. . . ." 1 *Chitty's Blackstone*, pp. 42, 46 (1832).

Allowing re-examination of questions decided on a first appeal by the same court "would lead to endless litigation." *United States v. Camou*, 184 U.S. 572, 574 (1902); *Illinois ex rel. Hunt v. Illinois C.R. Co.*, 184 U.S. 77 (1902).

an appellate mandate, followed since *Sibbald v. The United States,* 12 Pet. 488, 492 (1838). If a prevailing party then relies upon the mandate, and declines to relitigate an issue already determined, in remanded proceedings; but the district court allows the other party to present more evidence on the issue, and then decides that issue differently based upon a "one-sided" record, what is the result? Not only is this Court's doctrine of the law of the case ignored by permitting relitigation—but it is ignored based upon a record in which the issue is not fully and fairly litigated in the second trial. Unless an appellate court then corrects this error by applying the law of the case decided in the prior appeal, the doctrine itself becomes an instrument of entrapment depriving the party relying on it of a fair trial. And if a party cannot rely on the doctrine, it becomes meaningless.

There are, of course, rare instances in which reliance may not be a factor, where an intervening change in governing law has not caused a prevailing party to rely to his prejudice in further proceedings. But where, as here, reliance is a factor, any court must weigh the effect of this reliance before it can possibly conclude that the law of the case can be ignored.

In *Richles v. Margolies,* 279 U.S. 218 (1929), this question of reliance as it relates to the law of the case was implicit in the lower court proceedings, but was not addressed by the Court. As a consequence, an important element of the doctrine has been left undecided, contributing to confusion and a serious weakening of this concept of finality in federal litigation.

This recurring problem is discussed by Professor Moore in connection with *Richle v. Margolies,* 279 U.S. 218 (1929). 1B *Moore's Federal Practice,* §0.404(3), pp. 432 et seq. *Richle,* a federal receivership suit, was preceded by three

appeals to the Second Circuit. The first decision,[9] held that any judgment obtained by a claimant in federal court, to be obtained in an existing state court action, would not be binding on the receiver. *In reliance on that decision, the receiver made no appearance at the state court wherein the claimant obtained a default judgment.*

In the second appeal,[10] the circuit court held the default judgment conclusive, and remanded, without considering the effect of the receiver's reliance on the first decision. In the third appeal, the Second Circuit held that the second decision was the law of the case, and declined to re-examine it.[11] This Court granted certiorari, but considered only the merits, and affirmed. As noted by Professor Moore:

> "The Supreme Court, like the Court of Appeals, did not consider the factor of reliance upon the mandate which went down on the first appeal. Thus the policy behind the law of the case was completely perverted in this litigation." 1B *Moore's Federal Practice,* §0.404(3), p. 435.

In other words, if a party justifiably relies to his prejudice upon an appellate decision in further district court proceedings, he will be effectively deprived of a fair trial if the courts decline to apply the law of the case on which reliance was based. The inevitable result must be a "perversion" of the doctrine.[12]

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9. *Hatch v. Morosco Holding Co.,* 5 F.2d 1015 (2nd Cir.).

10. 19 F.2d 766.

11. 26 F.2d 247.

12. The factor of reliance also is more significant when the decision relied on is made after trial and appeal. Pre-trial rulings may more easily be altered than after full trial and appeal, because possible prejudice from reliance is minimal. 1B *Moore's Federal Practice,* §0.404(4), and cases cited. In our

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In this case, the court of appeals *en banc* definitively ruled in 1977, after two sets of briefings and oral arguments, upon a complete record, that the valuation of Ashland's commingled helium must be determined "independent of the contract base amount . . ." (A. 23a) (554 F.2d at 389). Its analysis left no doubt of this conclusion, as further indicated in the single dissent, which argued for use of the base amount in the valuation process (A. 36a) (554 F.2d at 395).

After this Court declined to review that holding, 434 U.S. 921, 968 (1977), Ashland justifiably considered the issue settled (A. 119a). It limited its case in the remanded proceedings to providing documentation concerning the selling price of helium in the market in order to support the district court's use of the $20.00 per m.c.f. figure utilized in the first trial (RII, Vol. I, pp. 211, 216, 224-240), as directed by the remand of the *en banc* appellate opinion.[13]

The district court indicated apparent agreement with Ashland's position at the commencement of trial in 1978 (RII, Vol. I, p. 208), yet after Ashland's evidence, the court permitted respondents to present testimony (over the specific objections of Ashland) from several economists, who were allowed to give opinions that the base contract price should be used in the valuation process (RII, Vol. II,

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Footnote continued—

present case, there were two appellate proceedings following the 1973 district court judgment, culminating in an *en banc* decision on rehearing in 1977. This Court's denial of certiorari later that year may have had no technical impact lending further finality, but, again, it is an obvious factor increasing the right to reliance on the *en banc* decision. See, 1B *Moore's Federal Practice*, §0.404(5--1), pp. 471 et seq.

13. We exclude reference to evidence on minor cost issues, pertinent to the work-back method, remanded by the court of appeals, as irrelevant here.

pp. 405-447). Only after such testimony did the district court indicate that it might reconsider use of the base contract price (Trial Tr., Vol. VI, pp. 710-711). The documentary record in the 1973 trial apparently became submerged as ancient history in the face of polished speeches ignoring those facts, given by witnesses from the stand.[14]

The district court later found that its 1973 finding was "erroneous" and adopted the base contract price as the key valuation factor (A. 71a), which resulted in a $3.00 per m.c.f. value as advocated in the dissent from the *en banc* decision. On Ashland's appeal, the court of appeals did not attempt to analyze its 1977 decision that the valuation must be "independent of the contract base amount." It made no reference to the unquestioned fact that Ashland had placed total reliance on the 1977 decision in presenting evidence on the limited issues remanded (A. 119a). The court merely affirmed by stating:

". . . We see no objection to the use of the contract value for this purpose. It was a negotiated figure

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14. Complete documentation of the negotiations for the 1961 contract was introduced in the 1973 trial. No new evidence thus, was thereafter available in 1978.

Respondents, thus, rather than claiming they had newly discovered evidence, contended (contrary to their admissions in their prior petitions to this Court) that the court of appeals' remand to reconsider "the proper starting value" (A. 30a) was a general remand enabling the court to consider again the base contract price as a starting value. This ignored the specific rejection of the base contract price in the opinion (A. 23a), ignored the approved use of the $2.00 per m.c.f. purification cost to be incurred by the U.S. prior to marketing the conservation helium, in the work-back method (A. 20a, 21a, 30a), and ignored that the reconsideration was because of respondents' claims that the selling price of pure helium was inadequately documented, which was the only reason for the court's allowing them to reopen that limited issue (A. 21a).

A general statement of remand at the end of an opinion must be read in context with the holdings, for otherwise "it would contradict what had been already expressed in the body of the opinion." *Washington Sportservice, Inc. v. M. J. Uline Company*, 313 F.2d 889, 893 (D.C. Cir.), cert. denied, 375 U.S. 814.

arrived at by parties dealing at arm's length . . . ." (A. 2a).[15]

In so holding, the court of appeals failed to apply the federal doctrine of the law of the case, and failed to consider what should be a most crucial element of that doctrine, that of reliance and its impact in depriving Ashland of a fair trial, by allowing relitigation on favored terms to one party.

The very silence of the court on the main issue presented is revealing. It did not discuss the issue or attempt to square the two decisions, because it could not.[16] In neglecting to evaluate the effect of the district court's refusal to apply the law of the case,[17] it failed to recognize the impact of Ashland's reliance on the fairness of the district court evidentiary hearing on remand, i.e., that Ashland presented a case to prove the selling price of marketable helium in the competitive market, while respondents were

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15. The complete formal and informal documentation of the negotiations was presented by Ashland in evidence in the 1973 trial (RI, Ex. Vol. III). These, of course, showed the obvious fact that the base price was negotiated at arm's length, but also showed that the base price was much lower than market value because of the contingency price provisions, and other elements of the contract. (Footnote 2, supra).

16. In 1977 it ruled that the valuation must be "independent" of the base contract price. Now it approves a valuation totally dependent on and utilizing that price. In 1977 it ruled that the government's $2.00 per m.c.f. cost of purifying the impure helium delivered by Phillips for conservation should be deducted, in the valuation formula, from the selling price of helium in the market place. Now it approves a result which entirely ignores and does not carry out that requirement. In 1977, thus, it ruled that the United States was the principal party in interest because of its obligation to reimburse Phillips for the amount of the judgment for Ashland exceeding $3.00 per m.c.f., under its conservation contract price provision. Now it approves a result which exonerates the United States of any liability.

17. Although the district court had allowed respondents broad pretrial discovery, it did not finally rule that it would reconsider the relevancy of the base contract price until its opinion was entered months after the trial.

permitted to present a case retrying the question of the propriety of using the base contract price as a starting value in the valuation process. The inherent unfairness of the parties litigating two very different issues, because of Ashland's reliance on the *en banc* decision, was not so much as adverted to by the court of appeals.[18]

In its *per curiam* decision, the court below recognized that the district court's decision to utilize the base contract price as the key valuation element was based on "the expert testimony." (A. 2a). Yet, it failed to recognize that respondents were permitted to hire and present opinions from four new economists in their attempt to negate the prior rejection of the base price as being relevant; whereas, Ashland, in reliance on the prior holding, declined to reopen that subject and had not retained any new witnesses in that connection.[19]

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18. The court's refusal to discuss an important federal doctrine, Ashland's principal point on appeal, appears to us to be a departure from the accepted and usual course of judicial proceedings (Rule 19 of this Court), which would warrant an exercise of this Court's power of supervision. Since, however, the *per curiam* opinion, in context with the earlier *en banc* decision, necessarily discloses the decision of the panel not to apply the law of the case, nor to consider the crucial element of reliance implicit in it, as urged by Ashland, the issue is now clearly defined, and should be decided on its merits. Cf., *Thompson v. Maxwell Land Grant & R. Co.*, 168 U.S. 451, 456 (1897).

A lower court's interpretation of its mandate is not controlling in this Court. *Federal C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

19. Respondents hired four economists shortly before the 1978 trial who had no previous knowledge of the helium industry. Based on incomplete data, they opined that the base price was a market value suitable for use in the work-back valuation method.

Had Ashland not relied on the 1977 *en banc* decision, it would have rebutted this misinformation by calling on genuine helium experts, such as Dr. Charles Laverick, who have demonstrated the erroneous nature of the type of conclusions which respondents induced the district court to accept (A. 75a-95a) as the

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Since this case will be direct precedent in the related massive class action cases which remain pending in the court of appeals since argument in 1976, the court's failure to consider the factor of reliance will result in serious prejudice to the rights of more than 30,000 citizens who are members of the prevailing classes, and, in our view, will deprive them of a fair price for their helium "commensurate" with market value as intended by Congress, and of many millions of dollars to which they are entitled, unless the decision below is reviewed and reversed.

Even more significantly, the effect of the *per curiam* opinion is to erode and negate an important foundation of federal law at a time when finality, and an end to perpetual litigation, are more needed than ever. This foundation can now be strengthened by providing guidelines essential to this concept of finality in federal jurisprudence.

This Court should, accordingly, require the weighing by federal courts of the juridical factor of reliance in determining whether the "law of the case" should be applied to enforce a prior decision. It is an important element of federal law which has not been, but should be, decided by this Court.

Footnote continued—
basis for its holdings. (Hearings on Helium-Energy Act of 1979, H.R. 2620, Committee on Interstate and Foreign Commerce, Serial No. 96-60, pp. 105-164). Dr. Laverick assisted a National Science Foundation study which described the 1973 termination of the helium program, premised on this misleading data, as a "disaster, to put it mildly".

II. The Conflict Among the Circuits As to Whether Post-Judgment Interest Under 28 U.S.C. §1961 Should Accrue From the Time of the Original Judgment, or From the Time of a Later Revised Judgment Following Appellate Remand, Should Be Resolved by This Court Because It Is an Important, Constantly Recurring Problem, Which Has Not Yet Been Settled by This Court.

Over 30 years ago, in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), certiorari was granted to decide this question, presented under the terms of what was then 28 U.S.C. §811, the predecessor statute to 28 U.S.C. §1961, but the majority decided the case on other grounds.[20] Four justices would have decided the question because of its importance:

> "Since the Court does not decide that question, I reserve decision upon it. But I dissent from the refusal to decide it now. The question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; and the uncertainty as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredict-

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20. The majority in *Briggs* decided that silence of the mandate on the question of interest in the intervening appeal precluded any award of judgment interest calculated from the date of the original verdict of the jury in favor of plaintiff, and thus did not reach the instant question.

Briggs has been distinguished in those instances wherein a judgment was entered on the original jury verdict (as contrasted to *Briggs*, where it had not), and interest has been allowed, notwithstanding silence of the first appellate mandate remanding the case, on the amount of the new judgment calculated from the date of the original judgment. *Taylor v. Washington Terminal Company*, 308 F.Supp. 1152 (D. D.C.); *Fassbinder v. Pennsylvania Railroad Company*, 233 F.Supp. 574 (W.D. Penn.).

able amount of injustice to litigants." (Per Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy joined).

Since then, with the increase of litigation, the conflict and confusion have proliferated. See generally, "Interest on Judgments in Federal Courts", 64 *Yale L.J.* 1019, 1040-1047 (1955). Many of the conflicting district court decisions are not reported.

Representing the view contrary to that below is *Perkins v. Standard Oil Company of California,* 487 F.2d 672 (9th Cir.). Post-judgment interest under §1961 was held to accrue on the judgment amount entered after an appellate remand, from the time of the earlier, original judgment, though the revised amount was lower than the original judgment. In substance and effect, the original judgment was viewed as having been partially affirmed, so that interest should be computed from the date of its original entry.[21]

21. *Perkins* was not a diversity case, and thus did not decide whether state or federal law should determine the question presented in such a case (487 F.2d at 675). Although ours is a diversity jurisdiction case, the *en banc* decision properly held that the question of interest and other issues were governed by federal law under the *Clearfield Trust* doctrine (A. 23a-27a) (554 F.2d at 389-391). See, *Phillips Petroleum Co. v. Texaco,* 415 U.S. 125 (1974). Thus, state law is clearly not applicable here.

A few courts, without analysis, have read §1961 to permit application of state law in ordinary diversity cases, as noted in *Perkins,* 487 F.2d at 675. These fail to distinguish the substantive question of pre-judgment interest as a part of the damages awarded, from the question of post-judgment interest which is a procedural device to compensate for loss of use of money incident to delays inherent in the federal system due to appeals, or otherwise.

Section 1961 adopts only the interest rate fixed by state law. Therefore, it should remain within the exclusive province of federal law to determine the time of accrual of that rate, in order to best serve the interests of federal courts in enforcing payment of federal judgments in a uniform manner. Cf., *Hanna v. Plumer,* 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.,* 592 F.2d 1133 (10th Cir.), cert. granted, ... U.S. ..... (1979), argued January 8, 1980. (No. 78-1862).

Alternatively, *Perkins,* held "that interest should run from the date of entry of the original judgment because that is the date on which the correct judgment should have been entered." (487 F.2d at 676).

In so holding, the Ninth Circuit declined to follow a contrary decision by the Seventh Circuit in *Harris v. Chicago Great Western R.,* 197 F.2d 829, recognizing that, although an important question, "the Supreme Court has so far declined to decide it." (487 F.2d at 674).

The Tenth Circuit, in the instant case, however, chose to follow *Hysell v. Iowa Public Service Co.,* 559 F.2d 468 (8th Cir.), which is to the contrary (A. 3a). In *Hysell,* the first appellate remand had "vacated" the original judgment for additional findings below, after which the district court ultimately entered judgment for the same amount. It held that post-judgment interest should accrue only from the time of the last judgment, not from the date of the original judgment.

The district court in *Premier Corp. v. Serrano,* 471 F.Supp. 444 (S.D. Florida, 1979), affirmed per curiam, 578 F.2d 566 (5th Cir.), cert. denied, 439 U.S. 1003, noting the absence of any decision by this Court on the issue, was forced to choose between these two lines of authority, that represented by *Hysell,* supra, and that represented by *Perkins,* supra. It found the *Perkins* case "more persuasive under the circumstances" and declined to follow *Hysell.*[22]

22. The Fifth and Sixth Circuits apply the rule espoused by the Ninth Circuit in *Perkins,* supra. *Louisiana and Arkansas Ry. Co. v. Pratt,* 142 F.2d 847, 849 (5th Cir.); *Givens v. Missouri-Kansas-Texas R. Co. of Texas,* 196 F.2d 905 (5th Cir.); *Woods Explor. Pro. Co., Inc. v. Aluminum Co. of Am.,* 509 F.2d 784 (5th Cir.), cert. denied, 423 U.S. 833; *Swartzbaugh Manufacturing Co. v. United States,* 289 F.2d 81, 85 (6th Cir.); *Petition of United States Steel Corporation,* 479 F.2d 489, 508 (6th Cir.), cert. denied, 414 U.S. 859.

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The *en banc* remand in 1977 by the court below affirmed the issue of liability, and affirmed the basic premises upon which the district court's 1973 judgment had been predicated. It remanded for reconsideration certain limited elements of the valuation formula which were dependent on objective factual data, and could result, at most, in a modification of the amount owing to Ashland. Thus the recitation that the original judgment was "set aside" for this purpose is wholly irrelevant. As noted in *Kneeland v. American Loan and Trust Co.*, 138 U.S. 509, at 511-512 (1891), equity regards the substance and not the form. "The rights of the parties are not to be sacrificed to the mere letter, and whether the language used was 'reversed', 'modified', or 'affirmed in part and reversed in part', is immaterial."[23]

Indeed, the *Kneeland* case, and *De La Rama v. De La Rama*, 241 U.S. 154, at 159 (1916), although not directly in point, approved awards of interest from the time of the original judgments which were reduced in later judgments as a result of appeals.

Footnote continued—

The Second and Seventh Circuits apply the rule espoused by the Eighth Circuit in *Hysell*, supra (followed by the Tenth Circuit in this case); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443 (2nd Cir. Frank, Circuit Judge, dissenting), cert. denied, 348 U.S. 856; *Powers v. New York Central Railroad Company*, 251 F.2d 813, 818 (2nd Cir., Lumbard, Circuit Judge, dissenting); *Harris v. Chicago Great Western R.*, 197 F.2d 829 (7th Cir.).

23. It has been suggested that the "equity of the statute" doctrine formulated in *Louisiana & A.R. Co. v. Pratt*, 142 F.2d 847 (5th Cir.), which "would allow interest on the total amount of plaintiff's ultimate recovery for the interval from first to final judgment" is "eminently sound" because this is the judgment which should have been entered at the date the original judgment was in fact entered. It assures full compensation without confusing tests and thus "offers a uniform solution to problems which are currently being solved by district court clerks in a variety of conflicting ways." Note, 64 *Yale L.J.* 1019, at 1040-1048.

Two factors have gained importance in recent times, which emphasize the greater need for a decision by this Court on this point.

The first factor is that a party entitled to money and deprived of it during appellate proceedings, is losing 10% or more per year to inflation alone, as well as loss of interest on the money at current high rates.

The second factor is that the party who owes the money has the use of it during that same delay. If he can use the money, interest free, it is to his interest to continue litigation. It is a sad fact, of which lawyers are well aware, that many cases are appealed, and appealed again, because of this motivation. This results, not only in injustice to the party entitled to be paid, and in a windfall to defendant, but unjustifiably increases the litigation load of the courts.

Although Ashland will receive pre-judgment interest at 6% per annum, Phillips has had the use of money owed Ashland during a time of high inflation and high commercial interest rates during more than five years between the original 1973 judgment, and the revised 1978 judgment. The economic loss (and corresponding gain to Phillips) from those combined effects is nearly 50% of the total judgment (including pre-judgment interest) as of 1978, under the present holding. Almost half of this loss would be recouped by approving the judgment interest rule followed by the *Perkins* line of cases.[24]

Moreover, it must be remembered that in many cases pre-judgment interest is not awarded at all. In these, the question now posed assumes even more vital importance.

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24. The post-judgment interest rate in Oklahoma from 1973-1978 was 10% (12 O.S.A. §727), and is thus the rate adopted by 28 U.S.C. §1961.

The time is ripe for this Court to decide this increasingly widespread and recurring question in order to resolve the existing conflict and confusion in the federal system.[25]

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25. Some of the rampant confusion has resulted from failure to clarify the respective roles of 28 U.S.C., §1912, allowing discretionary award of "damages" for delay on appeals, and 28 U.S.C. §1961, which is a mandatory direction allowing interest on judgments. See discussion, 64 *Yale L.J.* 1019, at 1023 et seq. This problem has been exacerbated by the failure of the 5-4 majority in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), to do so, as discussed in the dissent, 334 U.S. at 307-313. (The predecessor to §1912 was then 28 U.S.C. §878). The majority opinion appears premised on this failure and is open to serious question. Note, "Interest on Verdicts and Judgments in State and Federal Courts", 38 *Notre Dame Lawyer* 58, at 70 (1962). Cf., *Perkins v. Standard Oil Co. of California*, 399 U.S. 222 (1970).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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